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Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 114

STANDARD FRUIT AND STEAMSHIP COMPANY,
Petitioner

versus

UNITED FRUIT COMPANY
and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinion Below

The opinion of the Court of Appeals has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals is dated April 25, 1969, and has not yet been entered. Jurisdiction of this Court lies under 28 USC §1254.

Question Presented

Whether, in a civil antitrust action brought by the United States against the dominant company in its industry and terminated by a consent decree (*inter alia*) of divestiture, the detailed programs and progress reports filed with the Court by the defendant, in connection with the organization of a new company from its own assets pursuant to the decree, should be sealed from public disclosure, and from access by the defendant's smaller competitors whom the decree was presumably intended to protect.

As shown in the *Argument* below, the affirmative answer to this question by the Court of Appeals herein, conflicts directly or in principle with the expressed antitrust policy of Congress (15 USC §30; House Report 1356, 62nd Cong., 3rd Sess.; 49 Cong. Rec. 2511-13, 4622; Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program—1959); with the Justice Department's concurrence in the Congressional policy by formal regulation (28 CFR §50.1); with the Ninth Circuit's holding as to the scope of the Congressional policy (*Olympic Refining Co. vs Carter*, 332 F2d 260); and with holdings by this Court as to openness of court records generally (*Ex parte Uppercu*, 239 US 435) and as to the public interest in encouraging third parties' comments on antitrust-decree enforcement proceedings (*Cascade Natural Gas Corp. vs El Paso Natural Gas Co.*, 386 US 129).

As pointed out in the *Statement of the Case* below, the Justice Department actively supported petitioner's position in the District Court in this case, on the ground that rejection of that position would conflict with the Congressional and judicial policy described in the preceding paragraph.

Statement of the Case

In 1954, the United States commenced this civil antitrust action against respondent United Fruit Company. As appears from paragraphs 3-49 of the amended complaint and the portions thereof admitted in the answer, United Fruit dominates the banana industry in this country, a position it achieved by a series of acquisitions beginning in 1899. A2-20, A31-40.

In 1958, a consent decree was entered prior to trial. United Fruit was enjoined from a long list of antitrust violations (A45-49), and, in addition to divestiture of a Central American railroad (A59), was ordered to create, from its own assets, a new banana company having a specified banana-importation capacity (A60-64). The decree called for filing by United Fruit in 1966 (later extended to 1967), of a plan for compliance with its obligation to create the new company. A63.

Shortly after entry of the decree, the District Court granted United Fruit's motion for a protective order under Rule 30(b), Federal Rules of Civil Procedure, prohibiting inspection by outsiders of documents pro-

duced pursuant to discovery, of answers to interrogatories, or of "any document submitted by either party in this case". A69.

The plan for compliance, approved by the District Court on July 28, 1967, required United Fruit to submit to the Court (a) within one year thereafter, a detailed program for the initial organization, staffing, production, shipping, marketing and other arrangements for the new company; (b) within another year, a detailed program showing the shipping and terminal arrangements and other assets transferred to the new company by United Fruit to enable it to have the specified banana-importation capacity; and (c) within 90 days after approval of the plan, and every 60 days thereafter, a detailed report of its progress toward compliance with the plan, the programs and the decree. A71-73.

Petitioner, as a smaller competitor of United Fruit, has a vital interest in seeing the programs and progress reports filed by the latter pursuant to the plan of compliance. The Government agrees; and at petitioner's request, the Government wrote to the Clerk of the District Court in April 1968, asking him to permit interested persons to inspect and copy these programs and reports as public records. A77. Petitioner then applied to the Clerk for access to the documents; but after consulting with United Fruit's counsel, the Clerk advised appellant that the programs and reports are, in his opinion, sealed by the protective order entered in 1958. A79-80.

Petitioner then filed a verified motion in the anti-trust action, to which it has never been a party, for

leave to inspect and copy the programs and reports. The motion set forth petitioner's interest therein as a smaller competitor of United Fruit, and pointed out that although the decree appears to contemplate that United would create the new company from its own organization, the new company had already hired away the Manager of petitioner's Steamship Department. A73-77. At the hearing of its motion, petitioner filed in evidence a letter indicating that contrary to the decree's provision that United Fruit provide, from its own assets, terminal facilities for the new company in this country, efforts are afoot to have such facilities carved out of those of petitioner. A91.

Neither the Government nor United Fruit challenged petitioner's standing to file this motion. At the hearing thereof, the Government filed a brief and presented oral argument in support of the motion, on the grounds that "reports and detailed plans filed with the Court in divestiture proceedings should be open for public inspection in order to give the Court and the Government the benefit of the informed judgment of all those concerned with the affected industry as to the adequacy of the steps being taken by United and in order to advise potential purchasers and investors of the nature and prospects of the new company"; that "the experience of the Department of Justice in handling many divestiture cases indicates the desirability of such informed outside judgments on such issues as the suitability of properties and assets being transferred to the divested company"; that "these outsiders cannot be well informed if the basic data is kept secret"; that "there is a traditional com-

mon law policy in favor of open court proceedings in order to reassure the public as to the effectiveness of judicial administration": and that "United. by far the largest competitor Sovereign (the new company) must face. already knows all this allegedly confidential information in far greater detail than a competitor could possibly learn by reading the reports".

In opposition to the motion. United Fruit filed affidavits to the effect that the new company "has not been guilty of raiding Standard's organization". but that its employment of petitioner's Steamship Manager had been arranged through the suggestion and go-between offices of an anonymous mutual friend of his and of the new company's president. A86-87. The affidavits also hypothesized that petitioner. if allowed to see the programs and reports. would be in a position to take various steps to prepare itself to meet the new company's competition more effectively. A83-85. No showing was made of any actual threatened misuse by petitioner of the programs and reports.

At the conclusion of argument. the District Court denied the motion. Its opinion-order holds that the 1958 protective order extends to the programs and reports at issue. and that United Fruit's smaller competitors should be denied access thereto in order to protect the new company from any adverse effects of knowledge thereof by its (the new company's) prospective competitors. A92-94.

Jurisdictional uncertainties as to the proper avenue for appellate review of this order prompted an applica-

tion to this Court for mandamus (393 US 974) and appeals to both this Court (393 US 406) and the Court of Appeals, with the latter finally deciding the appeal following this Court's disposition of the applications to it.

The Court of Appeals (Fisher, DJ) affirmed. Citing decisions, of which the only ones relating to closing of court records involved discovery material expressly covered by Rule 30(b) of the Federal Rules of Civil Procedure, it held that the District Court had inherent authority to seal the record of United Fruit's compliance with the consent decree; that the District Court did not abuse its discretion in denying petitioner's motion, because petitioner did not need United Fruit's compliance plans "as evidence *at a trial*" (italics by the Court); and that the District Court's discretion "was in fact wisely exercised given the likely effects which misuse of the detailed and sensitive information could have", citing United Fruit's affidavit listing hypothetical misuses which might be made of the information in question. (As noted above, no showing was made that any such misuse was threatened in fact.)

Argument

The general holding of the Court of Appeals, that a district court has inherent power to seal the record in a case before it, conflicts with decisions of this and other Courts that judicial records are public records open to inspection by anyone having any legitimate interest therein. In the leading case, this Court took the extraordinary step of directing mandamus to the judges and

clerk of a district court to compel them to open the record to an interested party. *Ex parte Uppercu*, 239 US 435 (1915).[1]

The Court of Appeals held that it is not bound in this case by this Court's *Uppercu* decision, because petitioner, unlike Uppercu, does not need information from the record for use as evidence in another case. R105, p. 21 (Appendix) below. However, while the *Uppercu* opinion is written in relation to the factual background from which the case arose, there is no indication therein or in the other opinions to which reference is made in footnote 1 above, that the rule of these cases is so narrowly limited, or that it is other than a facet of the general principle of "sound public policy to avoid secret judicial proceedings in the course of trial so far as possible". *United States vs Consolidated Laundries Corporation*, 266 F2d 941, 942 (CA 2-1959).

As noted in the *Statement of the Case*, above, the only supporting cases cited by the Court of Appeals which related to record-closing orders, involved discovery material, and were decided under the strictly circumscribed statutory record-sealing authority of Rule

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[1] And see *Bell vs Commonwealth Title Ins. Co.*, 189 US 131 (1903); *Miller vs Moise*, 168 Fed. 940 (CC Pa.-1909); *Sloan Filter Co. vs El Paso Reduction Co.*, 117 Fed. 504, 506-7 (CC Colo.-1902) ("If strangers to the suit can be in any manner or to any extent bound by the result, they ought to be at liberty to inquire how the controversy is carried on . . . . These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested"), quoted with approval in *In re Greenbaum*, 243 Fed. 965, 969 (ED Mich.-1917); and other decisions collected at 175 ALR 1260.

30(b), FRCP. These cases do not stand for the existence of any "inherent" judicial record-sealing power of unlimited scope. One of the cited cases—*International Products Co. vs Koons*, 325 F2d 403 (CA 2)—did affirm the District Court's power to seal, in addition to discovery material, affidavits related thereto; this decision was rendered on the authority of *Gumbel vs Pitkin*, 124 US 131, which, however, did not involve record-closing at all, but only the inherent power of a court to prevent abuse of its writs and other process.

The specific holding of the Court of Appeals herein, that the record of United Fruit's compliance with the antitrust consent decree was properly withheld from petitioner as its competitor, is also in acute conflict with reiterated statements of Congressional policy. In the antitrust area, the open-record rule stems not merely from the traditional judicial recognition that justice, to be effective, should be done openly and not behind closed doors. Congress has repeatedly spoken out expressly against secret proceedings and secret records in public antitrust cases, on the ground that since such a suit is brought by the public prosecutor in the public interest, and affects, not merely the particular defendant, but its competitors and the consuming public generally, all interested members of the public are entitled to know what is going on in the case.

Early in antitrust history, a district court granted an antitrust defendant's motion that certain depositions be taken in closed session. Congress reacted by passing the Publicity-in-Taking-Evidence Act requiring that

such "proceedings shall be open to the public as freely as are trials in open court: and no order excluding the public from attendance on any such proceedings shall be valid or enforceable". 15 USC §30.

The Act was worded in terms of the particular problem which had arisen: but it is obvious from the attendant debates and committee report quoted at page 26 (Appendix) below, that the Act is expressive of a broad Congressional policy of open records and proceedings in public antitrust actions. The Court of Appeals for the Ninth Circuit so held in *Olympic Refining Co. vs Carter*, 332 F2d 260, 264 (1964), cert. den., 379 US 900. The holding by the Fifth Circuit in the case at bar that the policy of the Act is limited to depositions (R103, p. 20 (Appendix) below) conflicts directly with the cited decision by the Ninth Circuit.

Some years later Congress became concerned with the secrecy surrounding antitrust consent-decree procedures. It feared that the Justice Department might be using the consent-decree program to dispose of antitrust litigation on a volume basis, without adequate consideration of whether decrees were either designed or implemented to remedy the defendants' wrongful acts, and without the publicity which might have prompted opposition to the decrees by the defendants' competitors.

The House Antitrust Committee conducted an investigation. Its report concluded that "the element of secrecy that surrounds the entire consent decree program

is contrary to the general policy established by Congress (in the Publicity-in-Taking-Evidence Act), that antitrust enforcement proceedings shall be public". The Committee called on the Justice Department to open up such proceedings to public scrutiny, pointing out that it is especially important to give the wrongdoer's victims an informed opportunity to comment on consent-decree procedures inasmuch as entry of such a decree, by foreclosing the victims from the private-suit *prima-facie* evidentiary effect of a judgment for the Government after trial [15 USC §16(a), proviso], confers on the defendant "substantial immunity from private antitrust actions". Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program (1959), 23, 25; and see x-xiii, 12-18, 22-26.

The Government then adopted an official policy of encouraging interested parties to comment on proposed consent decrees prior to approval thereof by the Justice Department. 28 CFR §50.1. As stated by the Department in its brief supporting petitioner's motion in the District Court in this case, "these outsiders cannot be well informed if the basic data is kept secret".

The same policy reasons for publicity of consent decrees before approval, would seem to apply with equal force to the implementation of such decrees thereafter. This Court has recognized the public benefit from exposure of antitrust compliance procedures to the informed comments of third parties affected thereby, by laying down liberal post-decree intervention rules in *Cascade Natural Gas Corporation vs El Paso Natural*

Gas Co., 386 US 129 (1967); and see *Missouri-Kansas Pipe Line Co. vs United States*, 312 US 502, 506 (1941). The public interest in encouraging participation by private parties in the enforcement process, is closely akin to the interest "in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action". *Lawlor vs National Screen Service*, 349 US 322, 329 (1955).

The Court of Appeals apparently considered the District Judge competent to deal with all the manifold economic, political and social questions which might arise in the intricate process—now in its eleventh year—of carving out a new competitor from United Fruit's worldwide empire, by virtue of "his more than twelve years of conscientious supervision of this case". R106, p. 22 (Appendix) below. It detracts nothing from the District Judge's ability and dedication to point out that in all this time his only expert source of information has been the recidivous antitrust transgressor[2] which, according to the sparse evidence thus far available, seems to be fashioning the new competitor as a weapon against, rather than a shield for, the smaller companies.

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[2] In addition to the action here at issue, see A16 (¶44), and *American Banana Co. vs United Fruit Co.*, 213 US 347 (1909); *Bluefields SS Co. vs United Fruit Co.*, 243 Fed. 1 (CA 3-1917), error dis., 248 US 595; *Banana Service Co. vs United Fruit Co.*, 15 FRD 106 (DC Mass.-1953); *Sanib Corp. vs United Fruit Co.*, 135 FS 764 (SD NY-1955); *Banana Distributors, Inc. vs United Fruit Co.*, 269 F2d 790 (CA 2-1959); *United Banana Co. vs United Fruit Co.*, 362 F2d 849 (CA 2-1966); *International Railways vs United Fruit Co.*, 373 F2d 408 (CA 2-1967), cert. den., 387 US 921.

In this context, any hypothetical possibility of misuse of information by the smaller companies (none of whom has ever been accused of anti-competitive practices in fact) is outweighed by the need of the District Court for the assistance of their self-interested comments and protests which can be forthcoming only if they are afforded access to United Fruit's compliance data on file. Continued denial of such access will not only inhibit these protests which it is in the public interest to encourage, but also compound the competitive advantage of the dominant monopolist thereby enabled to proceed with its plans for the new company free of any possibility of opposition by those whom the consent decree was intended to protect.

Conclusion

The judgment below conflicts with this country's strong traditional policy against conduct of judicial proceedings of any kind *in camera*. It conflicts sharply with Congress' explicit reiterated policy against secrecy in public antitrust cases generally, and as to consent decrees in particular, and with this Court's recognition of the public interest in affording district courts the benefit of the informed comments and protests of third parties affected by antitrust-decree enforcement procedures. It conflicts with the Justice Department's express concurrence in the Congressional policy, and with the Ninth Circuit's view of the breadth of that policy.

It is respectfully submitted that the importance of the impact of the judgment below on the effective enforcement of the antitrust laws warrants review by this Court.

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APPENDIX.

OPINION OF THE COURT OF APPEALS
R98-107

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

FISHER, District Judge: This appeal challenges the district court's authority to enter and enforce a protective order prohibiting disclosure of divestiture plans filed in compliance with a consent judgment in an antitrust case. We believe the court did have such authority and did not abuse its discretion in enforcing the order.

In 1954 the United States brought a civil antitrust suit against appellee United Fruit Company alleging violations of sections 1 and 2 of the Sherman Act.[1] The plethoric complaint alleged numerous offenses amounting to unlawful domination of the banana import industry and prayed for injunctive relief. Chief Judge Lynne of the Northern District of Alabama was specially designated in 1956 by Chief Judge Hutcheson of this Court to sit in the Eastern District of Louisiana to hear this case.

After extensive discovery and pretrial proceedings, the district court entered a final consent judgment on February 4, 1958, without taking testimony or other evidence. United was enjoined from a long list of antitrust violations and was ordered *inter alia* to create from its own assets a new competitive banana company

[1] 15 U.S.C. Secs. 1 and 2.

having a specified banana importation capacity.[2] In addition, United was required to submit detailed plans for compliance with the decree by July 1, 1967.

Shortly after entry of judgment, the district court granted United's motion for a protective order pursuant to Federal Rule of Civil Procedure 30(b).[3] The order provided that third parties could not, without an express order of the court inspect or copy any document submitted and filed with the Clerk of the court by either party to the litigation.[4] The protective order

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[2] Art. VIII of the Final Judgment required that the new company be "reasonably calculated to be capable of importing" into the United States 9 million stems of bananas per year and provides that the new company shall be "staffed with managerial and other personnel in a manner reasonably calculated to enable the new company to conduct the operations of the banana business available to it by virtue of its properties and assets."

[3] 28 U.S.C. Rule 30(b):

"Orders for the Protection of Parties and Deponents . . . for good cause shown, the court in which the action is pending may make an order . . . that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

[4] "Therefore, it is ORDERED, ADJUDGED and DECREED by the Court that from and after the date of this order no persons other than a party or counsel for a party, or the court, shall be permitted, for any purpose, to inspect any document produced pursuant to pretrial discovery by either party, or any answer of either party to any interrogatory, or to inspect, copy or photostat any document submitted by either party in this case filed with the Clerk, without express order of this court, issued after due notice to both plaintiff and defendant."

was designed to insure by keeping secret intimately detailed information which another competitor could use devastatingly that the new company, once established, would function as a viable competitor.

The court approved United's proposed plan for compliance on July 28, 1967. The plan required that within 30 days, United should begin organization of the new company and complete divestiture of specified assets; that within one year after approval of the plan, United should submit a detailed program for the initial organization, staffing, production, shipping, marketing and other arrangements; that within two years United should submit shipping arrangements, liquid assets and other essential accessory assets transferred or offered to the new company with the distribution of defendant's capital stock; and that progress reports be submitted every 60 days thereafter. United has now organized the new company which is named Sovereign Fruit Company.

On July 2, 1968, appellant Standard Fruit and Steamship Company filed a motion requesting the Court to permit it "to inspect and copy the progress reports and programs submitted . . . pursuant to the plan, as well as other portions of the record." Standard is the second largest banana importer in this country, and Standard's purpose was admittedly one of self interest to obtain advance information about the proposed competitive plans, practices and policies of Sovereign. Af-

ter oral argument, the Court entered an order denying appellant's motion on the grounds that to reveal the confidential information on file would give Standard a competitive advantage deleterious to the public purposes of the Final Judgment; *viz.*, establishment and survival of a new competitor.

Standard brought this appeal alleging the district court was without authority to enter the protective order, but if it did have such authority, the court abused its discretion in not permitting Standard to inspect the documents on file.

Initially, we are confronted with whether this Court has jurisdiction. United's brief suggests lack of jurisdiction on two bases. The first involves Section 2 of the *Expediting Act*[5] which provides that cases under the Sherman Act brought by the United States are appealable only to the Supreme Court. The second is United's allegation that there is no final order here from which an appeal can be taken because the Court denied Standard's motion without prejudice to renew it at a later time. The first question was answered by the Supreme Court in *Standard Fruit & Steamship Co. v. United Fruit* Co., No. 740, January 21, 1969. Standard had in fact filed appeals to both this court and

[5] 15 U.S.C. Sec. 29:

"In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903 c. 544 §2, 32 Stat. 823; Mar. 3, 1911, c. 231 §291; 36 Stat. 1167, June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646 §17, 62 Stat. 989.

the Supreme Court. The Supreme Court dismissed the appeal before it citing, *Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 375 U.S. 39, which indicates an appeal to the Court of Appeals under 28 U.S.C. Sec. 1291[6] is permissable when the order appealed from disposes of a controversy outside the mainstream of litigation in the government's case. Clearly, Standard's motion to inspect was of an ancillary nature, and this Court therefore has jurisdiction. cf. also *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964). With respect to whether there is a sufficiently final order from which an appeal can be taken, we think the order here sufficiently final if it denied the relief sought irrespective of the fact that the order denied the motion without prejudice to renew it at a later time.

Appellant's primary argument that the district court lacked authority to enter the protective order is based on the *Publicity In Taking Evidence Act*[7] pertinent to antitrust cases which requires generally that deposi-

[6] 28 U.S.C. Sec. 1291:

> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 §48, 65 Stat. 726; July 7, 1958, Publ.L. 85-508, §12(e), 72 Stat. 348.

[7] 15 U.S.C. Sec. 30:

> "In taking depositions of witnesses for use in any suit in equity brought by the United States under sections 1-7 of this title, and in hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable. Mar. 3, 1913, c. 114, 37 Stat. 731."

tions and hearings be open to the public as freely as trials in open court. The district court concluded that the statute was limited by its terms to depositions and that if Congress had intended such a broad public policy as contended for by Standard, it would have so stated.

We agree that Congress did not intend to preclude entry of protective orders where necessary to effectuate a court's judgment. To the contrary, we find ample authority justifying the court's action. First, we note the well developed concept that the courts possess inherent equitable powers over their own process to prevent abuses.[8] Second, we quote with approval the rule stated in 4 Moore's Federal Practice, 2d Ed. pp. 2519-20:

> "There is no true privilege against discovery of trade secrets or other 'confidential' business information, but the courts nevertheless will exercise their discretion to avoid unnecessary disclosure of such information, particularly where the action is between competitors."

This Court has espoused this rule in another case involving competitors wherein Chief Judge Lynne had entered a protective order. cf. *A. H. Robins Co. v. Fadely*, 229 F.2d 557 (5th Cir. 1962). We stated there:

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[8] *Gumbel v. Pitkin*, 124 U.S. 131 (1888); *Int. Products Co. v. Koons*, 325 F.2d 403 (2nd Cir. 1963); *Baim & Blank, Inc. v. Bruno-New York, Inc.*, 17 F.R.D. 346 (SDNY 1955); 1 Moore, *Federal Practice*, par. 0.60(6) (2d ed., 1964).

> "The provisions of Rule 30(b) control: ". . . for good cause shown, the court in which the action is pending may make an order . . . that secret processes, developments, or research need not be disclosed, or that the parties shall . . . file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

Finally, we observe that the district courts have often exercised their discretionary power in civil antitrust cases by issuing protective orders sealing all or part of the record.[9] We therefore conclude that the district court unquestionably had authority to enter an order prohibiting revelation of the confidential information on file in this case.

With respect to whether the district court abused its discretion in not allowing Standard to inspect details concerning Sovereign's organization, a different question might have been presented had Standard sought the information as being relevant for use in another pending proceeding. The Supreme Court in *Ex Parte Uppercu*[10] has decreed that so long as the object of the motion physically exists, anyone needing it as evidence *at a trial* has a right to call for it, unless some

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[9] *U.S. v. American Optical Co.*, 39 F.R.D. 580 (N.C. Cal., 1966); *U.S. v. Lever Bros. Co.*, 193 F.Supp 254 (SDNY 1961); *U.S. v. Standard Oil Co.*, 23 F.R.D. 1 (SDNY 1958); *Service Liquor Distrib. Inc. v Calvert Distiller's Corp.* (SDNY 1954) 16 F.R.D. 507.

[10] 239 U.S. 435 (1915) cf. Also *Olympic Refining Co. v. Carter*, supra.

exception is shown to the general rule. We think the district court may have had this in mind when he denied the motion without prejudice. However, the sole argument advanced by Standard in this case was that Standard was placed at an unfair disadvantage if United, the "guilty" company, was permitted to know the intimate details of Sovereign's assets, programs, costs and markets while Standard, the smaller competitor, was not permitted such information. Moreover, Standard argued that if anyone should have the information, it should be the smaller competitors rather than the dominant one.

The district court recognized the anomaly of creating a new competitive company completely organized, managed and controlled by the "guilty" dominant company. However, essential to the judgment was the creation of an eventually autonomous competitor. The court concluded that the new company would have a much less chance of survival if all its competitors knew the details of its structure rather than United, alone, whose knowledge was not by choice and whose interest in seeing the new company survive was obvious and direct.

Once having concluded that the district court had authority to enter the protective order, we readily defer to its judgment in deciding whether to enforce it. Because of Judge Lynne's detailed knowledge of the record and complexities and peculiarities of the banana industry gleaned from his more than twelve years of conscientious supervision of this case, he was particu-

larly well qualified to determine whether disclosure would impose disadvantages inimical to the purposes of the Final Judgment. Moreover, we think it obvious that the discretion of the District Court was in fact exercised wisely given the likely effects which misuse of the detailed and sensitive information could have.[11] Accordingly, we find no error in the court's enforcement of the order.

AFFIRMED.

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[11] Numerous examples of the harm that disclosure of this information could do to Sovereign were given in the affidavit of William Hoelle, President of Sovereign. As stated therein, if competitors were aware of areas in which Sovereign planned to press its sales most vigorously, they could adjust and alter sales plans to frustrate and defeat Sovereign's sales success; if competitors had information as to Sovereign's proposed price aims, they could adjust pricing policies to undercut Sovereign's prices and harm its sales; if competitors had information as to promotional plans contemplated by Sovereign, they could copy the best features of those plans in advance or offset them by running promotions of their own in the same areas; if competitors had information as to the anticipated volume of Sovereign's imports to particular ports or marketing areas, they could adjust imports to those ports and marketing areas so as to defeat Sovereign's selling efforts; if competitors had even approximate knowledge as to Sovereign's costs, they would be able to know the price levels below which Sovereign could not go without risking financial failure; if competitors had knowledge of Sovereign's plans for changes in the volume of production, they could adjust production plans to counteract Sovereign's changes, etc.

JUDGMENT OF THE COURT OF APPEALS

R108

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel for appellant and defendant-appellee, and was taken under submission by the Court upon the record & briefs on file for plaintiff-appellee;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant pay to plaintiff-appellee, and defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 25, 1969

ORDER OF THE DISTRICT COURT

A92-94

The motion of Standard Fruit & Steamship Company for an order permitting it to inspect and copy reports and programs submitted by defendant United Fruit Company to this Court relating to the proposed plans, practices and policies of Sovereign Fruit Company as well as any other portions of the record in this proceeding came on for hearing before this Court on August 1, 1968. The Court, having heard oral argument and having considered the briefs and affidavits filed

by the parties, now finds: (1) That the considerations that led the Court to restrict inspection and copying of documents produced pursuant to pretrial discovery and of answers to interrogatories continue to exist; (2) That the reports and programs relating to Sovereign Fruit Company filed and hereafter to be filed contain and will contain confidential commercial information relating to the proposed operations of that company after its stock has been divested by United Fruit Company; (3) That disclosure of this information to Standard Fruit & Steamship Company will give it a competitive advantage; (4) That this Court has no jurisdiction or authority to require Standard Fruit & Steamship Company to supply either United Fruit Company or Sovereign Fruit Company with comparable competitive information relating to the commercial activities of Standard Fruit & Steamship Company; and (5) That the purposes of the Final Judgment and the public interest will not now be served by granting the motion of Standard Fruit & Steamship Company.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of Standard Fruit & Steamship Company shall be and hereby is denied, without prejudice to the right of Standard Fruit & Steamship Company or the plaintiff herein to make hereafter the same or a similar motion.

Done this 14th day of August, 1968.

/S./ SEYBOURN H. LYNNE,
Judge.

Excerpts from the Congressional Debates and Committee Report on the Publicity in Taking Evidence Act. Senate Bill 8000. 62nd Congress. 3rd Session

"Mr. NORRIS. . . . It is conceded by everybody that there are some cases that arise in court where there are reasons why the evidence should be taken in secret . . . but none of these reasons exist in cases brought by the Government under the Sherman antitrust act . . ." 49 Cong. Rec. 2511.

"Mr. CLAYTON. . . . In all these matters like the shoe machinery trust case the public is interested, and in every one of these investigations, through the medium of spreading the information through the press and through the bystanders who heard it, public information has been disseminated, and in many cases the Department of Justice has had its attention called to other facts with which it was unacquainted until these public hearings. . . . Now, Mr. Speaker, the day has long since passed when we should have star-chamber proceedings, and the public has a right to know, especially in a matter like the Shoe Machinery Trust case, what is going on, because a suit of that kind is not between private parties. It is a suit in behalf of the people." 49 Cong. Rec. 2512.

"Mr. NORRIS. . . . The first reason is that unless there is some reason to the contrary, the proceedings of court should always be open to the public. If we are going to permit the decision of this court to stand . . . you will be met at the threshold of every prosecution

under the Sherman antitrust law with an application for a secret hearing. In effect, it will mean that in every case under the Sherman antitrust law the evidence shall be buried and not given to the public if we do not pass this legislation. . . . (T)he cases to which this act would apply are always cases in which the United States Government is a party commenced by the Attorney General of the United States. He represents the people of the United States, and any citizen ought to have the right to go into the court and have cognizance of the proceedings . . ." 49 Cong. Rec. 2513.

"Mr. GREEN of Iowa. Has not the public the right to know whether these officials, such as the Attorney General, are conducting these examinations properly, and how will they know unless they be made public?" 49 Cong. Rec. 4622.

"In reality the people of the country are plaintiffs in the suit, and the taking of the evidence in secret, either by the court or any master representing the court, is not only contrary to the fundamental idea of our jurisprudence, but it would often result in a denial of justice. Everything pertaining to our courts should have the greatest publicity. Secret hearings would surround our courts with a mystery of doubt and eventually bring them into disrepute. If our courts are to retain the confidence and respect of the country generally, their official conduct must be entirely free from any suspicion of star-chamber proceedings." House Report 1356, 62nd Cong., 3rd Sess., p. 2, quoted at 49 Cong. Rec. 4627.